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No. 04-10566

In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

BRIEF FOR RESPONDENT STATE OF OREGON

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QUESTIONS PRESENTED

1. Does Article 36 of the Vienna Convention on Consular Relations confer on a foreign national detained in the United States individual rights of consular notification and access enforceable in the courts of the United States by that national?

2. Does the failure to advise a foreign national detained in the United States of his rights under the Vienna Convention result in the suppression of his statements to police?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

Summary of Argument 6

ARGUMENT 8

I. The Vienna Convention is self-executing. 9

II. The Vienna Convention does not create individual rights enforceable by a foreign national in a domestic criminal proceeding. 10

A. Neither the text nor context of the Vienna Convention establishes a right to information that is enforceable by a foreign national in a domestic criminal proceeding. 13

B. The negotiation history of the Vienna Convention does not establish a right to information that is enforceable by an individual in a domestic criminal proceeding. 20

C. The ratification history of the Vienna Convention does not establish a right to information that is enforceable by an individual in a domestic criminal proceeding. 25

D. Petitioner's interpretation of the Vienna Convention is inconsistent with the Executive Branch's interpretation of the treaty. 27

E. The interpretation of the Vienna Convention petitioner seeks is inconsistent with the interpretation of the treaty by other signatories. . 29

F. The decisions of the International Court of Justice also support the Oregon Supreme Court's interpretation of the Vienna Convention..... 32

III. Even if the Vienna Convention is construed to create an individually enforceable right, suppression of lawfully obtained evidence in a state criminal proceeding is not a remedy for violation of that right. 38

A. The Vienna Convention does not include a suppression remedy for violation of the signatory's obligation to inform a foreign national and to facilitate communication and access..... 39

B. Because Congress has not authorized suppression and because any individually enforceable right putatively created by the Vienna Convention would not be a right under our federal constitution, this Court cannot order suppression of evidence in a state criminal proceeding as a remedy for violation of that right. 40

C. Even if suppression were available as a remedy for petitioner's asserted "right", this Court should reject petitioner's assertion that only suppression can adequately address violations of that right... 43

IV. Petitioner failed to show any prejudice. 45

CONCLUSION..... 50

TABLE OF AUTHORITIES

Page

Cases Cited

Air France v. Saks,
470 U.S. 392 (1985) 11, 20, 29

Alderman v. United States,
394 U.S. 165 (1969) 47

Asakura v. City of Seattle,
265 U.S. 332 (1924) 10, 15

Avena and Other Mexican Nationals (Mex. v. U.S.),
2004 I.C.J. no. 128 (Mar. 31) 31, 32, 33

Ball v. Gladden,
250 Or. 485, 443 P.2d 621 (1968) 2

Benjamins v. British European Airways,
572 F.2d 913 (2nd Cir. 1978),
cert. den. 439 U.S. 1114 (1979) 29

Breard v. Greene,
523 U.S. 371 (1998) 45

Brown v. Illinois,
422 U.S. 590 (1975) 48

Carlisle v. United States,
517 U.S. 416 (1996) 41

Charlton v. Kelly,
229 U.S. 447 (1913) 14

Choctaw Nation of Indians v. United States,
318 U.S. 423 (1943) 20

Cicenia v. Lagay,
357 U.S. 504 (1958) 41

Colorado v. Connelly,
479 U.S. 157 (1986) 39

Culombe v. Connecticut,
367 U.S. 568 (1961) 41

Dickerson v. United States,
530 U.S. 428 (2000) 39, 41

Eastern Airlines, Inc. v. Floyd,
499 U.S. 530 (1991) 36

El Al Israel Airlines v. Tseng,
525 U.S. 155 (1999) 27, 29, 36

Foster v. Neilson,
27 U.S. (2 Pet.) 253 (1829) 14

Head Money Cases,
112 U.S. 580 (1884) 9, 13, 14

Immigration and Naturalization Service v. Stevic,
467 U.S. 407 (1984) 37

Johnson v. Eisentrager,
339 U.S. 769 (1950) 18

Jordan v. Tashiro,
278 U.S. 123 (1928) 10, 15

Kolovrat v. Oregon,
366 U.S. 187 (1961) 15, 27

LaGrand Case (F.R.G. v. U.S.),
2001 I.C.J. no. 104 (June 27) 32, 33, 35

Lynumn v. Illinois,
372 U.S. 528 (1963) 42

Mallory v. United States,
354 U.S. 449 (1957) 42, 48

Mapp v. Ohio,
367 U.S. 643 (1961) 41

McNabb v. United States,
318 U.S. 332 (1943) 41, 42, 48

Miller v. United States,
357 U.S. 310 (1958) 42, 48

Miranda v. Arizona,
384 U.S. 436 (1966) 42

Mu'Min v. Virginia,
500 U.S. 415 (1991) 41

Nardone v. United States,
308 U.S. 338 (1939) 47, 48, 49, 50

New York v. Harris,
495 U.S. 14 (1990) 48, 49, 50

Olympic Airways v. Husain,
540 U.S. 644 (2004) 29, 30

Payton v. New York,
445 U.S. 573 (1980) 49

Rocha v. State,
16 S.W.3d 1 (Tex. Ct. Crim. App. 2000) 32

Sale v. Haitian Centers Council,
509 U.S. 155 (1993) 37

Smith v. Phillips,
455 U.S. 209 (1982) 41

Sorto v. Texas,
2005 Tex. Crim. App. LEXIS 1622 (2005) 14

State v. Ehly,
317 Or. 66, 854 P.2d 421 (1993) 2

State v. Johnson,
335 Or. 511, 73 P.3d 282 (2003) 47

State v. Sanchez-Llamas,
191 Or. App. 399, 84 P.3d 1133 (2004)..... 2

State v. Sanchez-Llamas,
338 Or. 267, 108 P.3d 573 (2005) 1, 5, 13

Sumitomo Shoji America, Inc. v. Avagliano,
457 U.S. 176 (1982)..... 13, 27

United States v. DeLuca,
269 F.3d 1128 (10th Cir. 2001) 47

United States v. Kandik,
633 F.2d 1334 (9th Cir. 1980) 47

United States v. Nava-Ramirez,
210 F.3d 1128 (10th Cir.),
cert. den. 531 U.S. 887 (2000)..... 47

United States v. Rauscher,
119 U.S. 407 (1886)..... 10

United States v. Alvarado-Torres,
45 F. Supp. 2d 986 (S.D. Calif. 1999) 29

United States v. Alvarez-Machain,
504 U.S. 655 (1992)..... 13

United States v. Blue,
384 U.S. 251 (1966)..... 40

United States v. Ceccolini,
435 U.S. 268 (1978)..... 48

United States v. Crews,
445 U.S. 463 (1980)..... 49

United States v. De La Pava,
268 F.3d 157 (2d Cir. 2001)..... 14

United States v. Emuegbunam,
268 F.3d 377 (6th Cir. 2001) 14

United States v. Li,
206 F.3d 56 (1st Cir.) (*en banc*),
cert. den. sub nom Mu v. United States, 531 U.S. 956
(2000) 28

United States v. Lombera-Camorlinga,
206 F.3d 882 (9th Cir.)(en banc),
cert. den. 531 U.S. 991 (2000) 43

United States v. Stuart,
489 U.S. 353 (1989) 25

Valentine v. United States ex rel. Neidecker,
299 U.S. 5 (1936) 13

Volkswagenwerk v. Schlunk,
486 U.S. 694 (1988) 13

Ware v. Hylton,
3 U.S. (3 Dall.) 199 (1796) 10

Zicherman v. Korean Air Lines Co., Ltd.,
516 U.S. 217 (1996) 11

Constitutional and Statutory Provisions

Or. Laws 2003, ch. 109 45

U.S. Const. Article II, § 2 9

U.S. Const., Art. VI, cl. 2 9

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Peter Shepherd, *The Vienna Convention on Consular Relations: An Oregon Law Enforcement Perspective*, 11 WILLAMETTE J. INT'L L. & DISPUTE RES. 53 (2004).... 44

Restatement (Third) of the Foreign Relations Law of the United States, Section 907 cmt. a, at 395 (1987) 18

S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 18 (1969)..... 25

Vienna Convention on Consular Relations, S. Exec. Rep. No. 9, 91st Cong., 1st Sess. (1969)..... *passim*

STATEMENT OF THE CASE

1. On Saturday, December 18, 1999, petitioner, a Mexican national, shot at police and wounded one officer. *State v. Sanchez-Llamas*, 338 Or. 267, 269, 108 P.3d 573 (2005), Pet. App. 15. After his arrest, the police read petitioner *Miranda* warnings in both English and Spanish. *Id.* Petitioner made a number of incriminating statements during the initial interrogation, which occurred between 4:15 a.m. and 2:30 p.m.. *Id.*, 338 Or. at 270, Pet. App. 16; (1 Tr. 155-56). Law-enforcement officers did not inform petitioner that he could communicate with the Mexican consulate and did not inform the consulate of his arrest.

Petitioner moved to suppress the post-arrest statements on two grounds: (1) his *Miranda* waiver and statements were not voluntary, and (2) the police failed to comply with Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), S. Exec. Rep. No. 9, 91st Cong., 1st Sess. (1969). The trial court denied petitioner's motion. The trial court found "by clear and convincing evidence that [petitioner] understood his *Miranda* rights and knowingly, intelligently and voluntarily waived his right to remain silent and to have an attorney present during questioning."[1] Moreover, the trial court found "by clear and convincing evidence, given the totality of the circumstances, that [petitioner's] statement was voluntary." Finally, the trial court ruled that "any violation of the Vienna Convention that may have occurred * * * [did] not require suppression of [petitioner's] statements." *Sanchez-Llamas*, 338 Or. at 270, Pet. App. 16 (quoting trial court ruling).

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[1] The trial court's ruling is found in the excerpt of record accompanying petitioner's brief in the Oregon Supreme Court at E.R. 33-34.

2. After a jury trial, petitioner was convicted of 11 felony counts, including attempted murder and attempted aggravated murder, and sentenced to 246 months in prison. *Id.* Petitioner appealed the denial of his motion to suppress and the Oregon Court of Appeals affirmed without a written opinion. *State v. Sanchez-Llamas*, 191 Or. App. 399, 84 P.3d 1133 (2004). In the trial court and the Oregon Court of Appeals, petitioner's argument that his statements should be suppressed as involuntary rested principally on five grounds: the force used to arrest him, his language and cultural differences, his intoxication, his low intelligence, and his confinement during the questioning. The appellate courts presumed that the trial court decided the facts consistently with its ultimate conclusion. *State v. Ehly*, 317 Or. 66, 74-75, 854 P.2d 421 (1993); *see also Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968) ("If findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the ultimate conclusion, e.g., voluntariness or lack thereof, made by the trial court or jury.").

There was conflicting testimony about the amount of force used to effectuate petitioner's arrest. One witness, viewing the incident from 30 feet away, through a closed window, in the middle of the night, just after waking up, claimed that the arresting officers hit petitioner with the butt of a gun and slammed him against a nearby van. (1 Tr. 91, 93-97). Officer Whipple, however, testified that he did not see anybody slam petitioner into a van, 1 Tr. 114-115, and did not see anyone hit petitioner with the butt of a gun. 1 Tr. 108. The paramedic who initially examined petitioner testified that petitioner had suffered only very minor injuries. 1 Tr. 78. The doctor who examined petitioner at the hospital also did not notice any serious injuries and authorized petitioner's release back to the police officers. 1 Tr. 171-72. Petitioner himself stated that he

did not want to go to the hospital. 1 Tr. 77. The lack of injuries is inconsistent with petitioner's claim that he was beaten while being arrested and that he was physically incapacitated as a result. *See* Pet. Br. 3, 4, 49.

Similarly, the evidence on whether petitioner was "culturally and linguistically impaired" was contested. At the time he committed the crimes, petitioner had lived in the United States for 11 years, working at several different jobs. 1 Tr. 124, 143, 177. Petitioner understood many of the questions and commands that were communicated to him in English during and immediately following the crime. 1 Tr. 47, 69, 76, 79, 104-05, 108, 130, 136. The officer who served as the interpreter and who was with petitioner all day during the interviews spoke the same dialect of Spanish as petitioner. 1 Tr. 183-84. Officers repeatedly read petitioner his *Miranda* rights, in both English and Spanish. 1 Tr. 108, 123, 129, 176. Petitioner admitted that he understood those rights, as the trial court concluded and the appellate courts accepted. Although petitioner offered evidence about his cultural beliefs concerning police, there was no evidence to support his claim that his ability to make voluntary statements to the police was impaired by his cultural differences.

Nor was petitioner's intoxication so great as to render his statements to the police involuntary. The day before petitioner shot the police officer, he consumed a 12-pack of beer, spread out over most of the day. 1 Tr. 144. Officers who interviewed petitioner noticed signs of intoxication, but testified that petitioner "appeared coherent" and "wasn't intoxicated to the point where he couldn't understand what was going on." 1 Tr. 125; 175-76. Petitioner repeatedly told investigators that he was not drunk. 1 Tr. 145-46. A nurse who examined petitioner also noticed the smell of alcohol, but testified that petitioner was "not out of it." 1 Tr. 164-65. The evidence estab-

lished that petitioner was not so intoxicated that it affected his rational decision-making process.

Nor was there anything about petitioner's confinement during the interrogation that impaired petitioner's ability to make a free and unconstrained choice to speak with officers. After the shooting and arrest, petitioner was interviewed a number of times in the officers' offices and later at the hospital. 1 Tr. 129. Petitioner had several breaks during the interview process, including a break for lunch and for his examination at the hospital. 1 Tr. 126, 129, 138-39. Petitioner remained in handcuffs during the interviews, but early during the process, police adjusted his handcuffs to the front of his body. 1 Tr. 156-57.

The most important misstatement petitioner makes about the record is his assertion that the officers who initially interviewed him "quickly established that petitioner was a Mexican national who spoke little English." Pet. Br. 3-4. Although the State has never argued that it fully complied with the Vienna Convention, it has never been determined precisely when the breach occurred. However, petitioner's suggestion that it occurred at the outset of the interrogation is not supported by the record. The transcript pages petitioner cites for his statement that competent authorities "quickly established" his foreign nationality do not support the assertion.[2] Pet. Br. 4.

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[2] At page 76, a paramedic who evaluated petitioner testified that she did not speak Spanish and that petitioner "understood some of the things that we were saying" and "he seemed to understand what I was asking him." At page 108, Officer Whipple described transporting petitioner to the jail and testified that petitioner responded to commands made in English and the officer advised petitioner of his *Miranda* rights en route in English. At page 118, Detective Ford testified that he does not speak Spanish; he waited a few minutes

Nothing in the transcript establishes that the law-enforcement officers knew that petitioner was a foreign national; at most they show that the officers knew that petitioner spoke Spanish as well as some English. Detective Ford testified that he knew during the initial interview that petitioner had lived in the United States for 11 years, visited Mexico several times in the prior three years, and had a wife and children in Mexico. 1 Tr. 124, 143-44. The record does not establish that the detective ever asked petitioner if he was a foreign national, and petitioner did not volunteer that information. The trial court made no findings about when the officers knew that petitioner was a foreign national or when the officers would have been obligated to inform petitioner that they could contact the consulate on his behalf.

3. The Oregon Supreme Court addressed only one issue—whether the State's violation of the Vienna Convention required suppression of petitioner's post-arrest statements—and concluded that the Vienna Convention "does not create rights that individual foreign nationals may assert in a criminal proceeding." *Sanchez-Llamas*, 338 Or. at 269, Pet. App. 15. The court began by noting "the general rule, widely recognized in the federal courts, [] that rights created by international treaties belong to the signatory state and are *not* en-

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after petitioner's arrival at the station for a Spanish-speaking officer to arrive. At pages 122-123, Detective Ford testified that petitioner was given *Miranda* warnings in English and Spanish; that petitioner understood and asked for clarification on one part and again indicated that he understood it. At page 136, Detective Ford testified that petitioner responded to the English questions and did not wait for them to be interpreted into Spanish before responding. At page 175, the officer serving as an interpreter explained that he was asked to assist with translations.

forceable in American courts by private individuals." *Id.* at 272, Pet. App. 18 (emphasis in original). The court acknowledged that the presumption against the creation of individual, judicially enforceable rights may be overcome "by explicit wording and even by provisions that necessarily imply a private right of judicial enforcement." *Id.* at 274, Pet. App. 20. Nevertheless, the court found nothing in Article 36 of the Vienna Convention to suggest that the treaty refers to a detainee's "rights" as anything other than a convenient way of describing the obligation of the signatory state. *Id.* at 275, Pet. App. 21. Instead, the wording and purposes of the treaty "suggest that the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights." *Id.* (emphasis in original; footnote omitted).

Finally, the court concluded that the State Department's interpretation of the Vienna Convention was consistent with the court's reasoning, *id.* at 276, Pet. App. 22, and noted the unequivocal agreement of the state and federal courts that have addressed the issue. *Id.* at 277 n. 10, Pet. App. 23. The court concluded "that Article 36 of the [Vienna Convention] does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding" and affirmed petitioner's conviction and sentence. *Id.* at 276-77, Pet. App. 22-23.

4. Petitioner sought a writ of certiorari on both the voluntariness and the Vienna Convention issues. In granting certiorari, this Court limited the case to the Vienna Convention issues.

Summary of Argument

Petitioner asks this Court to require suppression of lawfully obtained statements in a state criminal proceeding as a remedy for a violation of Article 36 of the Vienna Convention. Article 36 does not create a right that a foreign national

like petitioner can enforce against the receiving state. Nothing in the text or context of the treaty supports recognition of a right that petitioner can enforce in a domestic criminal proceeding. The negotiation and ratification history confirm that the signatories to the treaty did not intend to create an individually enforceable right. The treaty and its history establish that it was intended to create obligations for the signatories that would further their ability to establish and maintain consular relations with one another. The fact that individuals may benefit from these obligations is insufficient to establish a right that the individual can enforce against one of the signatories. The Oregon Supreme Court's construction of Article 36 is consistent with the interpretation of the treaty by the Executive Branch. It also is largely consistent with the interpretation of Article 36 by the International Court of Justice.

Even if this Court adopts petitioner's proposed construction of Article 36 and finds a right that a foreign national can enforce in a domestic criminal proceeding, this Court should nevertheless reject petitioner's claim that suppression of lawfully obtained evidence is the remedy for a violation of that right. Nothing in the record ties the State's failure to inform petitioner as required by Article 36 to petitioner's voluntary statements made within the first 12 hours of petitioner's arrest. Even if the statements were made after the State's violation of Article 36, suppression of those statements would not be a remedy. This Court has invoked suppression in state courts as a remedy for constitutional violations, but petitioner concedes that any right created by Article 36 is not a constitutional right. This Court also has invoked suppression as a remedy for a violation of a statutory right, but only through the Court's supervisory authority over the federal courts. As this Court has recognized, it lacks the ability to impose suppression of evidence on state criminal courts for violations of federal statutory rights. Because any treaty right is the equiva-

lent of a federal statutory right, this limitation should apply here. Even if the Court could require suppression, it should reject petitioner's assertion that suppression is necessary as the only remedy that will satisfactorily address a violation of Article 36.

Should the Court disagree and require suppression of evidence for violations of Article 36, it should place a burden on the foreign national to come forward with evidence connecting the violation to some harm before the suppression remedy can be invoked. Petitioner failed to meet that burden in this case.

ARGUMENT

The Vienna Convention, a 79-article agreement between 168 signatory nations, was designed to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems" and "to ensure the efficient performance of functions by consular posts on behalf of their respective States." Preamble; App-1.[3] It imposes an obligation on "the competent authorities of the receiving State" to inform a detained foreign national that, if that individual requests, the authorities will notify "the consular post of the sending State" about the individual's detention and will forward communications from the individual to the consular post. Article 36(1)(b). Petitioner invites this Court to establish a court-ordered suppression remedy in domestic criminal prosecutions when competent authorities fail to provide the information required by Article 36(1)(b). Neither the Vienna Convention nor any other legal authority supports the creation of that remedy.

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[3] The preamble, Article 5, and Article 36 of the Vienna Convention are set out in the Appendix to this brief. App. 1-4.

I. The Vienna Convention is self-executing.

Petitioner asserts, and the State agrees, that the Vienna Convention is self-executing "in the sense of being implemented directly in the United States rather than through separate legislation." Pet. Br. 12. Similarly, the State agrees that the treaty has the domestic force of a federal statute. *Id.* The authority to establish binding obligations pursuant to a treaty rests with the President and the Senate. U.S. Const. Article II, § 2.[4] Once in force, the treaty is the equivalent of federal statutory law, pursuant to the Supremacy Clause. U.S. Const., Art. VI, cl. 2.[5]

Nor does the State dispute that *certain* treaties may be invoked by an "affected foreign national" in disputes between private parties or where the federal, state, or local government is a party. Pet. Br. 30; 33. But it depends upon the treaty. Treaties may "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U.S. 580, 598 (1884). Some treaties may be invoked by aliens in our courts as shields against local or

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[4] "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]"

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

state governmental actions that breach the terms of those treaties. *See, e.g., Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (where treaty expressly details the liberties secured for citizens or subjects of the signatories, those individuals may judicially enforce the treaty in the courts of the signatory); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) (involving same treaty). But these propositions of law merely invite close examination of the question that *is* disputed, namely, whether Article 36 of the Vienna Convention confers the rights claimed by petitioner and supports the remedy petitioner seeks.[6] Respondent and petitioner disagree, not about the self-executing nature of the treaty, but about what rights and obligations the treaty creates and about how those rights and obligations may be enforced.

II. The Vienna Convention does not create individual rights enforceable by a foreign national in a domestic criminal proceeding.

Contrary to petitioner's assertion, interpretation of the treaty is not to be determined by applying international-law principles. Pet. Br. 14. Instead, the proper construction of the

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[6] Similarly, the cases petitioner cites in footnotes 11 and 13, Pet. Br. 30, 33, do not support any proposition other than the unremarkable one that the intended meaning of the treaty at issue in a case controls the outcome. In each case, after determining the meaning of the treaty, this Court found that the domestic law, regulation or action challenged yielded to the treaty. *See, e.g., United States v. Rauscher*, 119 U.S. 407, 422-23 (1886) (treaty permitting extradition for specified crimes did not permit subsequent prosecution for different crimes); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 239-42 (1796) (dissecting the 4th article of the Treaty of Peace with Great Britain; reviving pre-treaty debts seemingly extinguished by Virginia law).

treaty is a question of federal law, often treated as similar to a question of statutory construction. *See Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 222-223 (1996) (although the Court's goal is to determine the shared expectations of the contracting parties, the Court determines for itself the meaning of the treaty). The starting point is with the language that the Court must construe and the context in which that language is used. *Air France v. Saks*, 470 U.S. 392, 396-97 (1985). The Court strives "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* (citations omitted).

Before turning to analysis of the text, it is important to clarify what "right" petitioner seeks to find in the Vienna Convention. Petitioner asserts that Article 36 of the Vienna Convention confers "a judicially enforceable individual right to consular notification and access." Pet. Br. 11. Petitioner later appears to recognize that a more limited "right" is at issue in this case, noting that the issue is not an individual's right to consular notification and access, but "[t]he requirement that a detained foreign national be informed of his or her right to contact the consulate[.]" Pet. Br. 21; *see also* Pet. Br. 10-11 (summarizing argument as focused on the "failure of the police to abide by their obligation, under Article 36, to inform the petitioner of his right to seek consular assistance"); Pet. Br. 42 (referring to violation as "not providing petitioner with the legally required notice of his Article 36 rights"); Pet. Br. 43, 45, 49 (failure again described as not informing petitioner of his rights).

To the extent petitioner attempts to broaden this claim to include interference with a right of access to his consulate, only the narrower focus is properly before this Court because the State never interfered with petitioner's access to his con-

sulate.[7] The only obligation the State violated was the requirement that competent authorities inform petitioner at some point in his detention that they could notify the consulate about his detention. The questions in the case narrow to whether the Vienna Convention grants petitioner an individually enforceable right to have the State provide that information and, if so, whether suppression of lawfully obtained evidence is a remedy for the violation of that limited right.[8] As will be shown, there is no basis for finding either that right or that remedy in the Vienna Convention or elsewhere.

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[7] Nor did the State interfere in any way with the consul's ability to carry out the duties and functions recognized in the Vienna Convention. It is important to note, as well, that petitioner never asserts that the "rights" at issue in this case include a right to specific consular assistance. Nor could he. Nothing in the treaty obligates a consul to respond when notified or to provide assistance to a detained foreign national. Thus, where petitioner bases his argument on steps the consul *may* take on behalf of a foreign national, *see* Pet. Br. 41-48, his assertion is irrelevant because it is based on a "right" that even petitioner does not argue is found in the treaty.

[8] Because petitioner seeks suppression of statements he voluntarily made to law-enforcement officers after a valid waiver of his *Miranda* rights, a third question arises. Petitioner asserts that suppression is the necessary remedy for his "illegally obtained confession." Pet. Br. 44. But petitioner never establishes a link between the treaty violation and the statements he wants to suppress. For suppression to be a remedy for "illegally obtained" evidence, petitioner also must establish that the treaty requires the information about consular contact to be provided prior to any law-enforcement interrogation.

A. Neither the text nor context of the Vienna Convention establishes a right to information that is enforceable by a foreign national in a domestic criminal proceeding.

Analysis of a treaty's meaning begins with the text of the treaty and the context in which the written words are used. *Volkswagenwerk v. Schlunk*, 486 U.S. 694, 699 (1988). A treaty's plain language controls absent "extraordinarily strong contrary evidence." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). If, as here, the right petitioner seeks is not expressly found in the text of the treaty, the question then becomes "whether the Treaty should be interpreted so as to include an implied term" providing the right and the remedy sought to be invoked. *See United States v. Alvarez-Machain*, 504 U.S. 655, 666 (1992) (where the treaty does not expressly include the right the party asserts, the Court will look at "whether the [right] had been so clearly recognized that the grant should be implied") (quoting *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 17 (1936)).

The presumption is against finding an individually enforceable right implied in the treaty, as the Oregon Supreme Court correctly noted. Treaties generally are viewed as agreements between the signatories that depend for their enforcement on the political and diplomatic efforts of the signatories, not the judiciary. As this Court stated in *Head Money Cases*, 112 U.S. at 598,[9]

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[9] Petitioner takes the Oregon Supreme Court to task for its reliance on this case and its characterization of "a presumption *against* the creation of individual, judicially enforceable rights[.]" *Sanchez-Llamas*, 338 Or. at 273; Pet. App. 20. *See* Pet. Br. 32-33. The Oregon Supreme Court is not alone in reading the case to stand for the proposition that treaties that create rights are the exception. *See, e.g., United States v.*

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provision on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

See also Charlton v. Kelly, 229 U.S. 447, 474 (1913) (stating same proposition); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided.").

To be sure, treaties *can* create rights that are judicially enforceable by an individual. *See Head Money Cases*, 112 U.S. at 598-599 ("a treaty may also contain provisions which confer certain rights upon the citizens * * *, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country"). But, especially where implied rights are invoked, treaties will be construed to create individually enforceable rights only where the intent of the signatories is unmistakable because the right is clearly intimated by the express language in the treaty or is necessary to fulfill the overall purpose of the treaty.[10]

Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) (relying on the *Head Money Cases* for same proposition as stated by Oregon Supreme Court); *Sorto v. Texas*, 2005 Tex. Crim. App. LEXIS 1622 (2005) (same); *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001) (same).

[10] The cases on which petitioner relies to challenge the Oregon Supreme Court's use of this presumption, Pet. Br. 31

Petitioner points to no language in the text of the Vienna Convention that expressly establishes the specific right he seeks to enforce against the receiving state. There is none. At best, petitioner seeks an implied right, based primarily on references in Article 36 to the "freedom" and "rights" of the foreign national. But an implied right that is enforceable by the individual against the receiving state is simply not to be found in the text or context of Article 36.

Viewed as a whole, the Vienna Convention addresses the rights and obligations of the signatories concerning consular relations. The broadly stated purpose of the treaty is to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems" and "to ensure the efficient performance of functions by consular posts on behalf of their respective States."

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n. 12, involve treaties with very different language and purposes than is found in the Vienna Convention. *Asakura, supra,* and *Jordan, supra*, both involved the Treaty of Commerce and Navigation between the United States and the Empire of Japan (1911), 37 Stat. 1504. That treaty began with an explicit and detailed enumeration of liberties secured for citizens or subjects of the signatory nations. These included the liberty to enter, travel, and reside in the country, to engage in trade or business, to own property, and to hire employees. Similarly, the 1881 treaty between the United States and Serbia at issue in *Kolovrat v. Oregon*, 366 U.S. 187, 191 n. 6 (1961), declared "There shall be reciprocally full and entire liberty of commerce and navigation between the citizens and subjects of the two high contracting powers, who shall be at liberty to establish themselves freely in each other's territory." In short, unlike the Vienna Convention, these treaties expressly conferred rights upon individual nationals of the signatory nations.

Preamble, App-1. Those functions are outlined in more detail in Article 5. App 1-3. Of the 79 articles, only Article 36 mentions any "rights" that a foreign national even arguably could enforce against a receiving state.

To be more precise, a textual analysis of Article 36 demonstrates that only Article 36(1)(b) defines obligations the competent authorities of the receiving state owe to a detained foreign national. In contrast, Article 36(1)(a)'s initial focus clearly is on the signatories, providing a general right of communication and access for the consular officers that is not limited to situations in which a foreign national is detained or otherwise within the control of the receiving state. Although it acknowledges that the foreign national has "the same freedom" of access and communication with the consular officer, it does not establish any general obligation for the receiving state or any specific obligations to a detained foreign national. The only obligation in Article 36(1)(a) that is imposed on the receiving state is to not interfere with consular communication or access either by restricting the consular officer or by restricting the foreign national.

Similarly, Article 36(1)(c) is an agreement between the signatories that consular officers of the sending state are entitled to have access to and communication with detained foreign nationals. Although the last sentence suggests an individual right, it is not a right that could be enforced against the receiving state. Rather, it would establish, at most, a right to oppose or prevent consular action on the individual's behalf—a right that could be enforced, if at all, only against the sending state.

If there is any individual right that could be enforced against the receiving state, it must be found in Article 36(1)(b). That subsection sets forth three obligations for the competent authorities of the receiving state: (1) to forward "[a]ny communication addressed to the consular post by the

person arrested, in prison, custody or detention * * * without delay;" (2) to notify the consulate of the sending state if a national of that state is detained, but only if the detained person requests it; and (3) to "inform the person concerned without delay of his rights under this subparagraph." Of those, only the last creates any direct obligation for the authorities of the receiving state to the detained individual. The first two are obligations the receiving state owes the sending state. Thus, from all the duties Article 36(1) defines, the only one that could arguably create an individual right vis-à-vis the receiving state is the duty to inform the detained foreign national of his "rights" under the section.

Both that duty and any right it implies are expressly limited by the introductory text of Article 36(1). That section makes it clear that the duty to inform—and all the other duties set forth therein—is established entirely "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Consular functions may benefit foreign nationals. But, given that qualifying language, it is clear that the obligations of the receiving state to facilitate those functions are owed to the sending state, not to the nationals of the sending state. Article 36(2) reaffirms that conclusion. It establishes that the convention's purposes—and the receiving state's laws, including its criminal laws—take primacy over any rights Article 36(1) purports to create. Those purposes include the efficient exercise of consular relations and the promotion of peace, security and friendly relations *between signatories*, not between signatories and the nationals of other signatories. *See* Preamble and Article 5, App 1-3. Certainly, none of the functions in Article 5 suggests that a purpose of the treaty was to provide foreign nationals with greater legal protections in a domestic criminal proceeding than a signatory provides to its own nationals.

The requirement that the receiving state inform the foreign national of his "rights under this subparagraph" does not establish the foreign national's "right" to enforce this obligation in any way. Nor does Article 36(1)(b) provide a basis for finding an implied right that the foreign national can enforce against the receiving state because it is not necessary to achieve the purposes of the treaty. The text and context of Article 36 demonstrate that the signatories intended to ensure the efficient performance of consular functions—functions that may benefit the foreign national. But, even when a treaty's purpose is to benefit individuals, it does not always follow that it creates an individually enforceable right. *See* Restatement (Third) of the Foreign Relations Law of the United States, Section 907 cmt. a, at 395 (1987) ("International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.").[11] As discussed above,

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[11] Compare, for example, the Geneva Convention of 1929, which clearly established agreements between the signatories designed to benefit individuals, but which this Court found provided no judicially enforceable individual rights. In *Johnson v. Eisentrager*, 339 U.S. 769 (1950), this Court noted that, although prisoners are entitled to the protections of the Geneva Convention, the treaty provides no basis for an individual claim against a signatory.

> These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against for-

there is nothing in the text of Article 36 or the larger context of the entire Vienna Convention that implies the intent to create that kind of right.

The treaty itself contains no remedies for violations. However, signatories who also subscribe to the Optional Protocol to the Vienna Convention (Optional Protocol) agree that "[d]isputes arising out of the interpretation or application of the [Vienna Convention] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. at 326, 596 U.N.T.S. at 488. Two points are significant. First, only signatories may bring a complaint to the International Court of Justice (ICJ). Article 34(1) of the Statute of the International Court of Justice, 59 Stat. 1055. Second, the effect of an ICJ decision is limited to the parties and the particular case resolved. Article 59, 59 Stat. 1055. Thus, a ruling by the ICJ cannot be enforced by a private individual in the courts of the member nations.

Thus, nothing in the text or context of the Vienna Convention expressly establishes that the signatories intended to cre-

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eign governments are vindicated only by Presidential intervention.

Id. at 789 n. 14. As with the Geneva Convention, it is not enough for petitioner to establish that the signatories to the Vienna Convention agreed to assume obligations that will, in some circumstances, benefit foreign nationals. Instead, petitioner must establish that the signatories intended to create rights that the individual could enforce against the receiving state and that these rights are so fundamental that a violation mandates suppression of otherwise admissible evidence in a state criminal proceeding.

ate rights to information or consular notification that a foreign national could enforce against a receiving state. Nothing in the text or context, including the purpose of the Vienna Convention and the optional remedy provisions, establishes a basis for finding an implied right that an individual could enforce against a receiving state.

B. The negotiation history of the Vienna Convention does not establish a right to information that is enforceable by an individual in a domestic criminal proceeding.

If there remains ambiguity about the proper construction of the treaty after examining the text and context, the Court next considers the history of the treaty including the negotiations leading to the treaty and its ratification history. *See Saks*, 470 U.S. at 400 (especially where the preparatory materials "are published and generally available to litigants, courts frequently refer to these materials to resolve ambiguities in the text"); *see also Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) ("[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.").

The treaty preparation materials support the Oregon Supreme Court's construction. Petitioner's argument to the contrary is flawed in two principal ways. First, petitioner assumes that any reference by a nation's delegate to a "right" in connection with an individual supports the specific right petitioner claims in these proceedings. However, that assumption is premised upon petitioner's continued conflation of the various duties discussed in the negotiation of Article 36 and his erroneous formulation of the issue for this Court to decide. The proper question is not whether the delegates were aware that individuals would benefit from the obligations under-

taken by the signatory states. Rather, the question is whether the parties negotiating the convention intended to create a right that an individual detainee could enforce against the receiving state. They did not.

Second, petitioner suggests that the debate regarding Article 36(1)(b) divided the delegates to the conference into two camps: those who favored creating an individual right and those who were opposed to such a right. He asserts that the inclusion of the duty to inform a detained foreign national of his "rights" under this subsection demonstrates that the conference as a whole rejected the arguments offered in opposition to his alleged right. Pet. Br. 21-22. Analysis of the treaty preparation materials reveals that petitioner's formulation of the relevant debate and its outcome is wrong.

As initially drafted, Article 36(1)(b) would have required the competent authorities of the receiving state to notify the consulate automatically whenever a foreign national was detained, regardless of the individual's wishes. *See* International Law Commission (ILC) Draft Article 36, Volume II, U.N. Conference on Consular Relations: Official Records (Official Records), at 24, U.N. Doc. A/Conf. 25/16, U.N. Sales No. 63.X.2 (1963). The delegates from several countries—including those whom petitioner cites for support of his alleged right—strongly favored mandatory notification as the best mechanism to ensure that the consular functions described in Article 5 could be effectively implemented in order to protect their nationals abroad. *See* Volume I, Official Records, at 337-41, ¶¶ 2 (France), 11 (Korea), 12 (India), 15 (Greece), 18 (Tunisia), 21 (United Kingdom), 22 (Norway), and 28 (Spain); *see also id.*, at 37, ¶ 13-14 (U.S.S.R.).

Two principal concerns animated the opposition to the proposed text for Article 36(1)(b), neither of which involved the creation of rights for a foreign national against a receiving state. First, several delegates expressed concern that manda-

tory notification did not provide for circumstances where an individual wished not to involve his consulate—for example, if the case involved a minor offense such as drunkenness or if the foreign national were seeking to break off relations with his country. *See, e.g.*, Volume I, Official Records, at 337, ¶ 39 (U.S.); *id.* at 341, ¶ 37 (France). Second, many delegates indicated that mandatory notification would impose an excessive administrative burden upon the receiving state, especially those states which had large populations of immigrants or tourists. *See id.* at 336-37, ¶¶ 34 (Thailand), 35 (Japan), 36 (Canada), 40 (U.S.); *see also id.* at 337-39, ¶¶ 3 (France), 10 (Yugoslavia), 16 (Vietnam).

When it became clear that the subsection would either be amended to address those two concerns or the conference would conclude without the adoption of Article 36 in any form, several delegates in favor of mandatory notification relented. Seventeen delegations jointly proposed a compromise text that would have required mandatory notification if a signatory's national was detained "[u]nless he expressly opposes it." Volume I, Official Records, at 82, ¶ 54.

Not entirely satisfied that the proposed compromise would sufficiently alleviate the administrative burden on receiving states, twenty delegates jointly proposed to amend the phrase "unless he expressly opposes it" to "if he so requests." Volume I, Official Records, at 82, ¶ 62. As summarized in the official record, the delegate introducing the amendment argued that:

> The purpose of the amendment was to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to pressure of work or to other cir-

> cumstances, there was a failure to report the arrest of a national of the sending State. Also, by stating that the consul should be notified if the national of the sending State so requested, the amendment would avoid misunderstanding between the consulate and the authorities of the receiving State. It would thus serve one of the purposes of the convention on consular relations, which was to ensure that understanding and harmony should prevail in the relations between the receiving States.

See Volume I, Official Records, at 82, ¶ 62 (delegate from the United Arab Republic).

The British delegate expressed concern that a detained person who was unaware of his right to request the involvement of his consulate could render Article 36 ineffective if the amendment were adopted. Although the delegate maintained that his delegation preferred a mandatory and unqualified duty of consular notification, the delegate suggested that, if the conference preferred the amended proposal, his delegation could accept it if a related duty of informing the detained individual of his rights under the subsection were included. Volume I, Official Records, at 83-84, ¶¶ 73-74. The conference ultimately adopted the proposed text for subsection (1)(b) with the United Arab Republic and British amendments. *See* Volume I, Official Records, at 87, ¶¶ 108-112.

The negotiations reveal that the detained individual's "right" to request consular notification under Article 36(1)(b) was not adopted, as petitioner suggests, to create a right that that individual could assert against the receiving state. The conference adopted that language to minimize the administrative burden on the receiving state. Similarly, the adoption of the duty to inform a detained foreign national of his "rights" under subsection (1)(b) was not intended to grant that individual a right he could assert against the receiving state. In-

deed, the conference only adopted those "rights" out of concern that the *sending state* could abuse a mandatory notification requirement. Petitioner's assertions to the contrary are contradicted by the treaty's history.

Equally unsupportable is petitioner's assertion that the conference amended Article 36(2), as the British delegation proposed, in order to ensure that an individual could raise the alleged violation of his "rights" under Article 36(1) to overcome the criminal procedural laws of the receiving state. Pet. Br. 22-23. The delegate who proposed the amendment was adamantly in favor of a *mandatory* notification requirement that was unqualified by any purported individual "right" to request that his consulate be notified. *See* Volume I, Official Records, at 83-84, ¶¶ 73-74. That fact shows that the British delegation intended that the amendment that became Article 36(2) would ensure only that the laws of the receiving state would not impede the consular rights *of the sending state*.

Further, the British amendment to Article 36(2) expressly prioritized the efficacy of consular functions over any rights Article 36(1) purported to create. The text the ILC initially proposed provided that "[t]he rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations *must not nullify these rights*." Volume II, Official Records, at 24 (emphasis added). The British amendment proposed to alter that text to state "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended." Volume II, Official Records, at 85 (emphasis added). That amendment subordinated whatever rights Article 36(1) created to the purpose behind creating those rights. And, as noted previously, the purpose behind the rights established in Article 36 is to "facilitat[e] the exercise of consular functions re-

lating to nationals of the sending State." Had the British delegation intended to ensure that the receiving state's laws could not preempt the *rights* created in that section—especially any purported individual rights—it easily could have proposed language that would have accomplished that goal. It did not. Consequently, the conference, in adopting that amendment, rejected any suggestion that an individual right, *per se*, could preempt the laws of the receiving state. There is, therefore, no evidence that Article 36(2) assists petitioner in his attempt to create an individual right that he could raise against the State.

In light of the above negotiations, there is little support for petitioner's claim that the conference intended to create an individual right that could interfere with a domestic criminal prosecution. Certainly where nothing expressly requires that result, it should not be inferred from general language addressing "rights" in the treaty discussions.

C. The ratification history of the Vienna Convention does not establish a right to information that is enforceable by an individual in a domestic criminal proceeding.

The ratification materials presented to the United States Senate when it considered and consented to the Vienna Convention support the Oregon Supreme Court's conclusion that the treaty was not intended to confer rights on a foreign national that would be enforceable in a domestic criminal proceeding. *See United States v. Stuart*, 489 U.S. 353, 365-68 (1989) (considering the ratification materials among the nontextual sources to aid in construing a treaty). The message from the State Department to the Senate was clear: the treaty would create no new rights that aliens could enforce to alter existing domestic laws. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 18 (1969) ("The Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions.");

Senate Foreign Relations Committee, *Id.* at 2, ("The Convention does not change or affect present U.S. laws or practice.").

Consistent with the treaty preparation materials, the State Department described the information and notification requirement in Article 36(1)(b) as a solution that grants an individual the option of whether to involve the consul, while at the same time striking a balance between the receiving state's administrative burden and the sending state's effective implementation of the functions described in Article 5.

> The solution adopted by the Conference to the problem of adjusting the notification obligations of the receiving State to the right of the individual concerned to request notification lies in the final sentence of subparagraph 1(b). That sentence requires authorities of the receiving State to inform the person detained of this right to have the fact of his detention reported to the consular post concerned and of his right to communicate with that consular post. This provision has the virtue of setting out a requirement which is not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad.

Ex. E, 91st Cong., 1st Sess., p. 60. Taken together with the statements that the treaty would not change existing domestic law, the State Department's presentation of Article 36 supports the Oregon Supreme Court's interpretation of the treaty.[12]

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[12] The State Department's description of Article 36 during the treaty ratification discussions also belies petitioner's assertion that the Executive Branch's construction of the treaty is a recently adopted litigation strategy. *See* Pet. Br. 25-26.

Petitioner argues that this same ratification history supports his position that the signatories intended to create individual rights. Pet. Br. 23-24. The difference in the two positions turns again on petitioner's failure to clarify the "right" he seeks under the treaty. As discussed above, it is not enough for petitioner to establish that the signatories were aware of individual benefits that might be obtained when the signatories fulfilled their obligations under the treaty. Instead, petitioner must establish an intent to create a right that the individual could enforce against the receiving state. The view of Article 36 that the State Department presented to the Senate is consistent with respondent's argument in this case. The State Department made clear that Article 36 creates an obligation on the part of the signatory that may benefit the foreign national, but it does not establish a right that the individual may enforce against the signatory.

D. Petitioner's interpretation of the Vienna Convention is inconsistent with the Executive Branch's interpretation of the treaty.

The State Department's view of the treaty is entitled to consideration and considerable deference beyond what it shows about the Senate's understanding of the treaty during the ratification process. "Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 168 (1999); *see also Sumitomo Shoji America*, 457 U.S. at 184-85 ("Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."); *Kolovrat*, 366 U.S. at 194 ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

The State Department consistently has taken the position that the Vienna Convention may benefit foreign nationals, but it does not create individual rights that can be enforced and remedied in the criminal justice systems of the signatories. *See United States v. Li*, 206 F.3d 56, 63-64 (1st Cir.) (*en banc*), *cert. den. sub nom Mu v. United States*, 531 U.S. 956 (2000). According to the State Department, "the [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Li*, 206 F.3d at 63 (quoted authority and quotation marks omitted). "The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned." *Id.*, quoting the Department of State Answers to the Questions Posed by the First Circuit. The State Department asserted this same position in two international tribunals, including the International Court of Justice, and in an advisory letter to State governors in 1970 and another advisory letter issued in 1989. *Id.* at 64.

The State Department's guidelines for implementing the Vienna Convention also provide some of the most useful nontextual resources for determining whether the treaty was intended to establish a right that an individual can enforce against a signatory and, in particular, whether information about consular notification must precede any law-enforcement interrogation. Although competent authorities are to contact the consul "as soon as reasonably possible under the circumstances," the State Department has said that contacting the consulate within 24 hours, or even as late as 72 hours, of the foreign national's request would comply. *See* U.S. Dep't of State, Consular Notification and Access 20, available at http://travel.state.gov/pdf/CNA_book.pdf (last accessed January 17, 2006). Additionally, the State Department notes that

the consul need not be notified outside of its regular working hours and nothing requires law-enforcement officers to delay an interrogation until the notification is completed and the consular official responds. *Id.*; *see also United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 991 n. 10 (S.D. Calif. 1999) (describing rough calculation that in two California counties in 1998, approximately 1313 aliens were apprehended each day and noting the serious difficulty that consular staff might have responding in a timely way to the requests for assistance).

This Court should give considerable weight to the State Department's reasonable views about the intended meaning of Article 36. Those views support the Oregon Supreme Court's construction of the treaty.

E. The interpretation of the Vienna Convention petitioner seeks is inconsistent with the interpretation of the treaty by other signatories.

In construing the meaning of a treaty, the Court considers how the treaty has been construed by the highest courts of other signatories. *See Saks*, 470 U.S. at 404 ("In determining precisely what causes can be considered accidents, we 'find the opinions of our sister signatories to be entitled to considerable weight.'") (citing *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2nd Cir. 1978), *cert. den.* 439 U.S. 1114 (1979)); *see also El Al Israel Airlines, Ltd.*, 525 U.S. at 176; *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent

that their respective courts strive to interpret the treaty consistently.").[13]

Few of the highest courts of other signatories have considered the questions presented in this case.[14] However, the intent of many of the signatories is reflected in their actions adopting mandatory-notification treaties, which undermine petitioner's assertion that they intended the Vienna Convention to create an individually enforceable right. Despite Article 36(1)(b) and the apparent authority of the individual detainee to prohibit consular notification, many nations have entered into treaties under which the detaining state is obligated, regardless of the foreign national's wishes, to notify authorities of the sending state of the fact of detention. The State Department lists 58 jurisdictions with whom the United States has agreed to mandatory notification. *See* U.S. Department of State, Consular Notification and Access, *supra*, at 47-49. In each of these treaties, many with other signatories of the Vienna Convention, the countries have agreed to notify the consulate of the detention of a foreign national, notwithstanding any request on the part of the foreign national that the notification not occur.

These mandatory notification agreements suggest that some signatories, including the United States, did not view the Vienna Convention as establishing a right for the detained

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[13] The Court has cautioned against following the opinions of intermediate appellate courts of other signatories where there are substantial factual distinctions between the cases and where the respective courts of last resort have yet to speak. *Olympic Airways*, 540 U.S. at 655 n. 9.

[14] The amicus brief of law professors submitted in support of respondent discusses the handful of reported cases from other signatories addressing this issue.

foreign national to play any role in the notification decision. The treaties that pre-dated the Vienna Convention have remained in effect. They support the State's argument that, in negotiating the treaty, the delegates were concerned with the possibility that consular notification would not always be in the best interest of the individual, but that concern did not extend to creating any right for the individual to override decisions of the signatory. It is a stretch from recognizing—and attempting to minimize—the possible negative consequences of consular notification to a conclusion that the delegates sought to create a right that the individual foreign national could enforce against a signatory.

Additionally, the practice by other signatories confirms that they did not intend to create a right of suppression for violations of receiving state's obligations under Article 36. A State Department survey of 136 signatories demonstrates that the overwhelming majority of countries sees no link between interrogation of a foreign national and the duties of information, notification and access under Article 36.[15] Consequently,

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[15] Of the approximately 80 countries where consular notification is not mandatory, over 70 d not require their authorities to inform a detained foreign national of his right to contact his consulate prior to interrogation. *See* Declaration of Ambassador Maura A. Harty Concerning State Practice in Implementing Article 36(1) of the Vienna Convention on Consular Relations, U.S. Counter-Memorial in *Avena*, Annex 4, ¶¶ 16-19. Over 75 signatories do not require their authorities to stop an interrogation after an individual requests consular notification. At least four signatories expressly authorize *incommunicado* periods during which no consular access is permitted while five countries simply do not permit consular access until after the initial questioning of the individual is complete. *Id.* at ¶¶ 36-37. Finally, in only two countries is

petitioner's proposed construction of Article 36, rather than harmonizing the practice of the United States with that of the other signatories, would impose greater obligations and burdens on the United States than on other signatories who have not construed the Vienna Convention as creating rights enforceable in domestic criminal proceedings. *See Rocha v. State*, 16 S.W.3d 1, 17 (Tex. Ct. Crim. App. 2000) ("If we now find that the Vienna Convention treaty must be enforced through the exclusionary rule provided by [the state statute], Texas may soon find itself to be the *only* jurisdiction in the entire world that enforces the treaty through the use of an exclusionary rule sanction.") (emphasis in original; footnote omitted).

F. The decisions of the International Court of Justice also support the Oregon Supreme Court's interpretation of the Vienna Convention.

The ICJ decisions are, for the most part, consistent with the position respondent asserts here. Although, in both *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. no. 104 (June 27) and *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. no. 128 (Mar. 31), the ICJ concluded that Article 36(1) creates individual rights, the court did not conclude that those rights were enforceable by the individual. Instead, consistent with the Optional Protocol, the ICJ concluded that violation of the obligations under Article 36 served as the basis for one signatory to bring an enforcement action against another signatory. *LaGrand*, 2001 I.C.J. Paragraph 77, at 493; *Avena*, Paragraph 40.

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there any evidence that failure to inform an individual of the right to consular notification might lead to the suppression of his incriminating statements. *Id.* at ¶ 41.

In *LaGrand*, Germany asserted that the United States had violated Article 36 by failing to inform the LaGrand brothers of their right to contact the German consul and that that failure prevented Germany from exercising its rights under the Vienna Convention. See ¶ 65. The United States did not dispute either that it had violated its obligation to provide the information to the LaGrand brothers or that this served as a basis for Germany's claim against the United States. The ICJ agreed and noted that, although not always true, the failure to provide information resulted in a breach of Germany's rights under Article 36(1)(a) and (c). ¶ 74. The ICJ also agreed with Germany that Article 36(1)(b) creates an individual right, but it is notable that the ICJ did not find a right *enforceable* by the individual detainee. Rather, the individual rights, "by virtue of Article I of the Optional Protocol, may be invoked in this Court *by the national State* of the detained person." ¶ 77 (emphasis added). Similarly, *Avena* was brought by Mexico against the United States for violations of the Vienna Convention alleged to have injured Mexico. ¶¶ 1, 40. This was as it had to be under the terms of the Optional Protocol and the limited authority of the ICJ to resolve disputes only between the signatories. Additionally, in both cases, once the ICJ determined that the United States had violated the Vienna Convention, the remedy was left in large part to the United States. *See LaGrand* ¶ 125.

The ICJ also has rejected an argument that Article 36(1) requires the receiving state to *immediately* inform a detained foreign national of the opportunity for consular notification before any interrogation occurs. Based in part on its review of the treaty preparation materials, the ICJ held that "neither the terms of the Convention as normally understood, nor its object and purpose, suggest that 'without delay' is to be understood as 'immediately upon arrest and before interrogation.'" ¶ 85. In addressing the preparatory materials, the ICJ noted

that discussions of the acceptable outer time-limit for notification ranged from one month to as short as 48 hours; because no agreement could be reached on a precise time period, the delegates settled on "without delay." ¶ 86.

> The Court thus finds that "without delay" is not necessarily to be interpreted as "immediately" upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1(b), that the receiving State authorities "shall inform the person concerned without delay of his rights" cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

¶ 87.[16]

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[16] Both the convention's text and the treaty preparation materials well support the ICJ's conclusion that the signatories did not intend the phrase "without delay" to impose an obligation to inform a detained foreign national of his rights either immediately or prior to interrogation. The treaty preparation materials make clear that the conference did not intend that the obligations created under Article 36 should interfere with a criminal investigation. The text originally proposed for Article 36(1)(b) required that consular notification take place "without undue delay" specifically to allow "for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation." *See* Volume II, Official Records, at 24. Although the conference amended the text to read "without delay" to reduce ambiguity in the obligation, it did not intend that amendment to mean immediately and certainly not prior to interrogation. *See* Vol-

Moreover, even when it found that lengthy detentions without notification violated the Vienna Convention, the ICJ did not—and could not—declare that suppression of evidence would be the appropriate remedy. As in the *LaGrand* case, the ICJ directed the United States "to permit review and reconsideration of these nationals' cases by the United States courts * * * with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." ¶ 121. The ICJ expressly refused to presume "that partial or total annulment of conviction or sentence provides the necessary and sole remedy." ¶ 123.

Finally, the ICJ refused to address Mexico's claim "that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention." ¶ 124. The ICJ observed, however, "that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that Mexico draws from its contention in that regard." *Id.*

Thus, although petitioner seeks to draw support for his position from the decisions of the ICJ, that support is very limited. Contrary to domestic authority, the ICJ has recognized that Article 36 creates individual rights. But, because of the limitations of the Optional Protocol and the court's jurisdiction, the ICJ has not construed Article 36 as creating rights that an individual foreign detainee can enforce against the re-

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ume I, Official Records, at 339, ¶ 15 (Greek delegation stating that a 10-day limit for notification would be adequate); *id.* at 339-40, ¶¶ 20-21 (British delegation noting that notification within 48 hours would be acceptable).

ceiving state in a domestic criminal proceeding. At most, the ICJ's opinions establish that, as a remedy for violations of the *signatory*'s rights under Article 36, the United States should seek to establish a procedure whereby a court can review the violation and determine whether there was any prejudice to the foreign detainee's criminal prosecution and, if so, determine an appropriate remedy. It would be a great leap from the ICJ's opinions to petitioner's assertion that he is entitled to suppression of lawfully obtained evidence without any showing of prejudice whatsoever.

In sum, petitioner fails to establish that Article 36 of the Vienna Convention creates a right that an individual can enforce against the receiving state in a domestic criminal proceeding. The text, context and history of the treaty instead support the construction adopted by the Oregon Supreme Court. Nor do the many amici who support petitioner establish a basis for construing Article 36 in the manner petitioner seeks. At the heart of many of amici's arguments is the assertion that it would be prudent and would promote the advancement of international law in this area if the Court would recognize an individually enforceable right to consular assistance for a detained foreign national. While that may be a laudatory goal, it is not one that can be achieved in this case for two reasons. First, the Court must construe the meaning of the treaty as it was adopted; changes in the intent of the signatories must be left to the political, not the judicial, process. *El Al Israel Airlines, Ltd.*, 525 U.S. at 171 n. 12 (where the balance of interests addressed in the Warsaw Convention may have shifted, it is not the role of the courts to alter the construction of the treaty; "Postratification adjustments * * * are appropriately made by the treaty's signatories."); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 537-39, 546 (1991) (Court looks to meaning of treaty at the time of its drafting; evidence that reflects subsequent meaning of terms used in treaty not

useful in construing the meaning of the terms as used in the treaty).

Second, even if the Court found within the treaty a general intent to promote consular assistance for a foreign national faced with a criminal proceeding, that would be insufficient to support the construction that the amici desire. It takes more than general references or aspirational language to establish an enforceable right; treaties are enforceable only to the extent they impose concrete obligations. *See, e.g., Immigration and Naturalization Service v. Stevic*, 467 U.S. 407, 428 n. 22 (1984) (describing language of United Nations Protocol Relating to the Status of Refugees that "merely called on nations to facilitate the admission of refugees *to the extent possible*" as "precatory and not self-executing") (emphasis in original). As this Court stated when addressing claims under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577:

> The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but *a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.*

Sale v. Haitian Centers Council, 509 U.S. 155, 183 (1993) (emphasis added).

This Court should affirm the Oregon Supreme Court's conclusion that Article 36 of the Vienna Convention does not create rights that a foreign detainee can enforce against the receiving state in a domestic criminal proceeding.

III. Even if the Vienna Convention is construed to create an individually enforceable right, suppression of lawfully obtained evidence in a state criminal proceeding is not a remedy for violation of that right.

The only remedy petitioner ever has sought for violation of the obligations imposed under the Vienna Convention is the suppression of statements he made during the hours immediately following his arrest. Petitioner made those statements after he repeatedly was advised, in both English and Spanish, of his *Miranda* rights. His waiver of the *Miranda* rights and his subsequent statements to law-enforcement officers were voluntary, making those statements lawfully obtained evidence. There is no legal basis for suppressing those statements in a state criminal proceeding. Nor is suppression required as a matter of good policy to ensure that state officials make their best efforts to comply with the requirements of the Vienna Convention.

As an initial matter, it is important to recognize that the State's violation of the Vienna Convention did not occur prior to petitioner making the statements he seeks to suppress. The treaty preparation materials and other non-textual material clearly establish that the obligation to inform a detained foreign nation under Article 36 is satisfied if the information is provided within 24-40 hours after the authorities determine an individual is a foreign national subject to the treaty. It is unclear precisely when the obligation arose in this case.[17] It is

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[17] Law-enforcement officers knew that petitioner spoke Spanish as well as English, had lived in and traveled to Mexico, and had a wife and children in Mexico. That does not establish that the officers knew petitioner was a foreign national. At best, the initial investigation may have provided the authorities enough information that they should have asked whether petitioner was a foreign national.

clear that it arose after petitioner voluntarily made the statements, which all were given within the first 12 hours of petitioner's arrest.

Even if petitioner's statements could be tied more directly to the State's violation of Article 36, suppression would not be the remedy for that violation. Historically, exclusion of coerced confessions was based in large part on the recognition that they are "inherently untrustworthy." *See Dickerson v. United States*, 530 U.S. 428, 433 (2000). Similarly, questions about the voluntariness of a confession focus on the circumstances that surround the interrogation and whether they suggest that the defendant's will was overborne. *Id.* at 433-34 (discussing voluntariness test under the Fifth and Fourteenth Amendments). At the same time, there are limits on the use of the exclusionary rule as a remedy, in part because of the recognition that suppressing lawfully obtained evidence imposes a hardship on the effective prosecution of criminal laws. *See Colorado v. Connelly*, 479 U.S. 157, 166 (1986) ("the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence.") (citations omitted). Given the long-standing legal and policy limitations on the exclusionary rule, this Court should reject petitioner's efforts to require suppression of lawfully obtained evidence as a court-ordered remedy for a violation of Article 36 of the Vienna Convention.

A. The Vienna Convention does not include a suppression remedy for violation of the signatory's obligation to inform a foreign national and to facilitate communication and access.

The starting point must again be with the text of the Vienna Convention. Nothing in the treaty expressly dictates the remedy to be imposed for violations of the signatory's obligation to inform a foreign national of the signatory's duties under Article 36(1)(b). As discussed above, nothing in the pre-

paratory materials or other relevant documents discuss what remedy would be required, assuming the individual has a right to enforce that obligation in a domestic criminal proceeding. Additionally, no federal statute or rule mandates a judicial remedy of any kind for the failure of a competent authority to provide the information required by Article 36(1)(b). Nor is there any basis from which to imply that the drafters and signatories to the Vienna Convention intended to impose a remedy of suppression of evidence in a domestic criminal proceeding.

The parties do not appear to disagree on this point. Petitioner does not suggest that the exclusionary rule is the appropriate remedy because it is a remedy expressly or impliedly found within the Vienna Convention itself. Instead, petitioner looks to domestic law as the basis for imposing this remedy. Pet. Br. 35-39.

B. Because Congress has not authorized suppression and because any individually enforceable right putatively created by the Vienna Convention would not be a right under our federal constitution, this Court cannot order suppression of evidence in a state criminal proceeding as a remedy for violation of that right.

Petitioner asserts that suppression is the appropriate remedy for the failure to notify petitioner of his Article 36 rights because "[i]n the United States criminal justice system, the government is denied the use of evidence that it obtains in violation of a constitutional provision, statue, or rule of procedure that defines or safeguards a critical legal right." Pet. Br. 35, *citing United States v. Blue*, 384 U.S. 251, 255 (1966). More particularly, he explains that "[t]his Court has not limited the use of the exclusionary rule to constitutional violations, but has suppressed confessions in circumstances where the integrity of the criminal proceeding was jeopardized." Pet.

Br. 37 (citing various cases). However, petitioner misreads the authority upon which he relies.

As stated above, this case does not present an instance in which either the treaty or any statute enacted by Congress requires or authorizes evidentiary exclusion as a remedy. When such a mandate or authorization is absent, this Court has unambiguously declared that its authority to intervene in state criminal prosecutions is limited to the enforcement of constitutional requirements. While the Court has supervisory authority over the federal courts and "may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals," *Carlisle v. United States*, 517 U.S. 416, 426 (1996), the Court lacks similar supervisory power over the courts of the several States. *Dickerson*, 530 U.S. at 438 (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension")); *Cicenia v. Lagay*, 357 U.S. 504, 508-09 (1958); *McNabb v. United States*, 318 U.S. 332, 340 (1943). Instead, the Court's authority "[w]ith respect to proceedings in state courts, * * * 'is limited to enforcing the commands of the United States Constitution.'" *Dickerson*, 530 U.S. at 438 (quoting *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991)).[18] In short, this Court has stated clearly that it lacks the power petitioner asks it to invoke.

Petitioner concedes, as he must, that any benefit Article 36 confers upon him is "not a constitutional right itself." Pet.

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[18] Examples include *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (Fourteenth Amendment due process requirement that confession be voluntary).

Br. 44; *see also* Pet. Br. 36 ("The treaty rights conferred by the Vienna Convention are on full parity with rights flowing from a Congressional statute."). That concession should put an end to petitioner's argument that this Court can require a state court to suppress voluntarily made statements to remedy a violation of the Vienna Convention. Nonetheless, petitioner argues that this Court should set aside his conviction and order that his confession be suppressed.

In support of this argument, petitioner points to two forms of precedent. First, petitioner relies on cases in which this Court has ordered evidentiary exclusion as a remedy in a state criminal prosecution for a constitutional violation. Pet. Br. 41, citing *Lynumn v. Illinois*, 372 U.S. 528 (1963) (admission of coerced confession violated Fourteenth amendment Due Process Clause); Pet. Br. 44, citing *Miranda v. Arizona*, 384 U.S. 436 (1966). Because, as petitioner concedes, any violation of the Vienna Convention is not a constitutional violation, these cases have no bearing on the present case.

Second, petitioner relies on instances in which this Court, in the exercise of its federal-court supervisory authority, has ordered the suppression of evidence obtained by law-enforcement authorities through violation of a statute or rule and offered by the government in a federal prosecution. Pet. Br. 37-39, citing *Miller v. United States*, 357 U.S. 310 (1958); *McNabb*, *supra*; and *Mallory v. United States*, 354 U.S. 449 (1957). Petitioner cites no authority, and the State is aware of none, that would permit the Court to extend the remedy imposed in these cases to a state criminal prosecution. Nor has petitioner otherwise explained why this Court could repudiate its previous declarations that it lacks authority to impose the exclusionary rule upon a state court as a remedy for a non-constitutional violation.

This is not to say that a violation of the Vienna Convention can play no role in a state criminal proceeding.[19] But a violation, in and of itself, is not a basis for suppressing lawfully obtained evidence, including statements made by the defendant during the initial law-enforcement investigation.

C. Even if suppression were available as a remedy for petitioner's asserted "right", this Court should reject petitioner's assertion that only suppression can adequately address violations of that right.

Interpretation, application, and enforcement of an international treaty is an area that traditionally has been an executive branch function. And there are good reasons for that. As the Ninth Circuit in *United States v. Lombera-Camorlinga* explained:

> The State Department indicates that it has historically enforced the Vienna Convention itself, investigating reports of violations and apologizing to foreign governments and working with domestic law en-

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[19] It may be appropriate, for example, to consider violations of the Vienna Convention as part of the "totality of the circumstances" when a defendant asserts that statements he made to the police were not voluntary. Petitioner attempted to make that argument in the Oregon Supreme Court, but was prevented from doing so because he had failed to raise it in the trial court. But, properly presented, a defendant could argue that the failure to provide him consular access—or to inform him that he could have consular access—would be appropriate factors to consider in determining whether his waiver of his *Miranda* rights and his statements really were voluntary. Additionally, a defendant could invoke the State's pardon or clemency procedures to seek review of violations of the Vienna Convention.

> forcement to prevent future violations when necessary. The addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this instance from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct.

206 F.3d 882, 887-888 (9th Cir.)(*en banc*), *cert. den.* 531 U.S. 991 (2000) (citation omitted).

Petitioner argues that these traditional political remedies for violations of international treaties are insufficient. He claims that "the 36-year history of Article 36 in this country has been a virtually unbroken pattern of noncompliance and nonenforcement by state and local authorities." Pet. Br. 44. Contrary to petitioner's calamitous assertions, it is not true that this Court must impose suppression as a remedy for violations of the Vienna Convention because nothing else will prove effective. Pet. Br. 44-45.

Oregon and many other States have taken significant steps to ensure greater compliance. Oregon has worked with numerous interested parties to enhance awareness of the Vienna Convention requirements and simplify compliance. Oregon Attorney General Hardy Myers convened a group in September 2000 to explore ways in which Oregon law-enforcement officials could improve compliance with Article 36 of the Vienna Convention. *See* Peter Shepherd, *The Vienna Convention on Consular Relations: An Oregon Law Enforcement Perspective*, 11 WILLAMETTE J. INT'L L. & DISPUTE RES. 53, 58 (2004). As a result, police recruits and newly hired law-enforcement officers receive special instruction about the Vienna Convention and jail managers have agreed on a form of

notification to be used in all state jails to notify aliens of the requirements of the Convention. *Id.* at 58-59. In addition, the 2003 Oregon legislature strengthened the laws related to training requirements for law-enforcement officers on the requirements of the treaty and clarified the obligation of officers and others to comply with the notification requirement. Or. Laws 2003, ch. 109.

These voluntary efforts demonstrate that the suppression remedy is unnecessary to deter any allegedly unlawful conduct. And, perhaps more than any action the States can take to emphasize the obligations under the Convention, this Court's consideration of the issues last term and in the two cases this term will likely result in significantly greater awareness of those obligations across the country. It is not necessary for this Court to impose the extreme remedy of suppression in order to prompt state and local officials to do what they are required to do by law.

IV. Petitioner failed to show any prejudice.

Petitioner made no attempt in the trial court or the state appellate courts to establish that he suffered prejudice as a result of the State's failure to comply with the Vienna Convention information and notification requirements. Petitioner did not establish in the state trial court—and therefore could not establish in the state appellate courts—that he would have done anything differently in his interactions with the police if they had informed him of his "right" to consular notification. Nor did petitioner establish how the Mexican consul would have responded to notification had the police informed the consul of petitioner's arrest.

In *Breard v. Greene*, 523 U.S. 371 (1998), this Court expressed considerable skepticism that *any* remedy could be granted under the Vienna Convention without a showing of prejudice. The Court concluded that, even if a foreign national

has individually enforceable rights under the Vienna Convention, the individual must comply with procedural rules in order to bring a claim. *Id.* at 375-76. The Court noted that Breard's failure to raise his claim under the Vienna Convention in state court prevented him from obtaining an evidentiary hearing that would be necessary to establish his claim. "Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have provided, and what factors he considered in electing to reject the plea bargain that the State offered him." *Id.* at 376. "Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Id.* at 377.

The same problem exists in this case. Petitioner cannot now establish how compliance with the Vienna Convention would have had an effect on his confession, trial and conviction. Nor does petitioner offer any reason why this Court should disregard his failure to establish prejudice. Instead, petitioner flatly declares that "the prosecution in this case * * * had the burden of establishing the admissibility of petitioner's statements following the Article 36 violation." Pet. Br. 47-8. More particularly, he argues that "the prosecution had to establish that interfering with petitioner's right to communicate with the consulate and to receive the multiple benefits of consular assistance did not taint petitioner's subsequent decisions to continue with the interrogations and give self-incriminating statements." Pet. Br. 48. Petitioner's argument ignores his own obligation to establish a connection between the treaty violation and the evidence he seeks to suppress. This Court has placed the initial burden of establishing that connection on the criminal defendant. In *Nardone v.*

United States, 308 U.S. 338, 341 (1939), in which this Court was called upon to decide whether the government could make derivative use of illegally intercepted telephone conversations, the Court set forth the various evidentiary burdens that apply to determining whether evidence derived from unlawful police conduct should be suppressed:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

See also Alderman v. United States, 394 U.S. 165, 183 (1969) (quoting *Nardone* in relation to evidence obtained as result of electronic surveillance conducted in violation of Fourth Amendment).[20]

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[20] Lower courts have described the defendant's burden "in terms of establishing a 'factual nexus' between the unlawful police conduct and the challenged evidence—at a minimum, the existence of a 'but-for' relationship." *State v. Johnson*, 335 Or. 511, 520, 73 P.3d 282 (2003), *citing United States v. Kandik*, 633 F.2d 1334, 1335 (9th Cir. 1980); *United States v. DeLuca*, 269 F.3d 1128, 1132 (10th Cir. 2001); *United States v. Nava-Ramirez*, 210 F.3d 1128, 1131 (10th Cir.), *cert. den.* 531 U.S. 887 (2000). Yet, though a "but for" showing by the criminal defendant is necessary, this Court has stressed that such a showing may not be sufficient to require suppression in every case. "Even in situations where the exclusionary rule is plainly applicable, [the Court has] declined to adopt a 'per se

The cases on which petitioner primarily relies – *Miller v. United States, McNabb v. United States* and *Mallory v. United States* – do not relieve him of the burdens described in *Nardone*. None of those opinions even discussed the assignment of evidentiary burdens. Moreover, each of those cases was decided upon a record (regardless of which party created it) that established both that the defendant had been subjected to an unlawful detention (*McNabb*[21] and *Mallory*) or search (*Miller*[22]) and that the evidence suppressed was obtained in the course of that unlawful detention or search. In such cases, this Court has observed that the answer to the initial question—whether the challenged evidence is the product of the government's unlawful conduct—"may be assumed." *New York v. Harris*, 495 U.S. 14, 19 (1990), quoting concurring opinion from 72 N.Y.2d 614, 625, 532 N. E. 2d 1229, 1235 (1988). But that is not petitioner's situation. The trial court found petitioner's statements voluntary, the Oregon appellate courts affirmed, and that factual issue has been conclusively resolved. There was no *Miranda* violation here. Nothing in

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or "but for" rule' that would make inadmissible any evidence * * * which somehow came to light through a chain of causation that began with an illegal arrest." *United States v. Ceccolini*, 435 U.S. 268, 276 (1978), quoting *Brown v. Illinois*, 422 U.S. 590, 603 (1975).

[21] "Benjamin [McNabb]'s confession was secured by detaining him unlawfully and questioning him continuously for five or six hours." 318 U.S. at 345.

[22] "The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed." 357 U.S. 313-14.

the treaty or domestic law rendered petitioner's otherwise lawful detention and interrogation unlawful solely because the officers failed to provide him the Article 36(1)(b) information. Therefore, in accordance with the assignment of evidentiary burdens set forth in *Nardone*, petitioner was required to come forward with evidence showing a connection between the treaty violation and the statements he sought to suppress.

More illustrative than the cases cited by petitioner is *New York v. Harris*, in which this Court was called upon to decide whether to suppress a stationhouse confession which, after two separate waivers of *Miranda* rights, was taken from a criminal suspect following his warrantless arrest from his home in violation of the Fourth Amendment, as interpreted in *Payton v. New York*, 445 U.S. 573 (1980). Although it was clear that the officers' warrantless entry into Harris's home violated the rule of *Payton*, the Court noted that there was nothing in the reasoning of *Payton* to suggest "that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house." 495 U.S. at 18. Following that reasoning, the Court concluded that "Harris' statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else." *Id.* at 19. Because the stationhouse confession "was not an exploitation of the illegal entry into Harris's home," *id.*, the Court declined to order suppression. In explanation of its holding, the Court stated that "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal government activity.'" *Id.*, quoting *United States v. Crews*, 445 U.S. 463, 471 (1980). Implicitly, the holding in *Harris* represented a finding that Harris failed to present evidence sufficient for that threshold determination.

Like Harris, petitioner made his statements after an arrest that was supported by probable cause and after waivers of *Miranda* rights that were knowing and voluntary. His custody and the custodial interviews remained lawful despite the treaty violation. To justify suppression of his statements as a remedy for the treaty violation, *Nardone*, *Harris* and logic itself require that, at a minimum, petitioner should have come forward with evidence to show that, but for the treaty violation, he would not have made incriminating statements to the police. Petitioner did not do so and cannot do so now.

CONCLUSION

This Court should affirm the judgment of the Oregon Supreme Court.

Respectfully submitted,

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January 31, 2006

The Preamble to the Vienna Convention states:

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 5 states:

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribu-

nals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 36 states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.